NO. 92-491

Supreme Court, U.S.
FILED
JUL 1 1992
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In the
Supreme Court of the United States

OCTOBER TERM, 1992

ROGER GLEN BRISTER, INDIVIDUALLY
AND AS NATURAL TUTOR AND ADMINISTRATOR
OF THE ESTATE OF HIS MINOR CHILD,
ERIC BRISTER, AND PATRICIA
GONZALES BRISTER

PETITIONERS

V.

UNION TEXAS PETROLEUM CORPORATION

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW*

1. Is determination of a worker's status as a borrowed employee a question of fact or a question of law?

2. Did the trial court err on a motion for summary judgment in finding that there were no genuine issues of material fact as to Roger Glen Brister's employment status and in finding that as a matter of law, Brister was a borrowed employee of Union Texas Petroleum and therefore precluded from bringing a tort action against Union Texas Petroleum?

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* Parties to this action, in addition to those listed in the caption, are Petroleum Personnel, Inc. and its worker's compensation insurer, Aetna Casualty and Surety Co. Both are intervenors.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a Writ of Certiorari issue to review the April 2, 1992 opinion of the United States Court of Appeals for the Fifth Circuit affirming the trial court's grant of summary judgment entered September 3, 1991.

REPORTED OPINIONS

The opinions of the U.S. District Court for the Eastern District of Louisiana and the U.S. Court of Appeals for the Fifth Circuit were not published. Copies of those opinions appear in the Appendix.

JURISDICTION

The United States District Court for the Eastern District of Louisiana issued a memorandum ruling on August 26, 1991, granting the motion for summary judgment of Union Texas Petroleum Corporation. The final judgment granting Union Texas Petroleum's motion for summary judgment and dismissing plaintiff's complaint was filed on August 30, 1991 and entered on September 3, 1991. A three-judge panel of the United States Court of Appeals for the Fifth Circuit affirmed the trial court's judgment in an opinion dated April 2, 1992. Petitioners invoke the jurisdiction of the Supreme Court under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS

This case arises under the Longshore and Harbor Worker's Compensation Act (LHWCA) 33 U.S.C. Sections 901-50, as made applicable to workers on offshore petroleum production platforms under the Outer Continental Shelf Lands Act, 43 U.S.C. Sections 1331-56. Although portions of these statutes may be tangentially relevant to the issues presented in this case, this case does not turn on interpretation of statutory provisions, but on interpretation of the judicially derived borrowed employee doctrine.

STATEMENT OF THE CASE

Plaintiff, Roger Glen Brister, is a highly skilled technician who specialized in the maintenance and repair of compressors used in the production of hydrocarbons. More particularly, Brister was uniquely qualified to repair and maintain Solar brand turbine compressors. In October, 1989, Brister was hired by Petroleum Personnel, Inc. (PPI), a company which contracts with oil companies to provide

personnel to work oil company jobs. Brister was hired by PPI because of his expertise in Solar compressors, not as a general laborer. Brister was not hired by PPI to work a specific job for a specific oil company. Rather, he was hired because of his specialized skills and expertise in Solar compressors. Those skills were very marketable.

Given his expertise and the demand for his services, Brister was able to control the terms of his employment. For example, Brister told PPI the salary he wanted ($3000 per month). R. 186-87, 206-07. Although there were several companies interested in Brister's services as a Solar compressor expert, R. 206-07, Brister was eventually assigned to work on Union Texas Petroleum (UTP) Job 757.

At all times, Brister was a direct employee of PPI. He never applied to UTP for employment, had no plans to do so, and was never approached by UTP concerning employment. R. 203. Interestingly, however, UTP foreman A. J. Loupe (apparently without Brister's knowledge) had recommended that UTP hire Brister outright because of his experience and expertise. R. 228. UTP's acknowledgment of Brister's experience and expertise is corroborated by the fact that Brister was the highest paid contract hand working on the UTP platforms. R. 228. See also R. 204 (Brister's hourly rate was twice that of other contract workers).

There were no direct UTP employees with experience or expertise in the maintenance and repair of Solar turbine compressors, R. 218-19, nor were there any PPI employees with such experience or expertise. Brister's duties in addition to troubleshooting, maintenance, and repair, included teaching UTP personnel how to maintain the Solar compressor on a temporary basis. R. 220-21.

Although PPI was Brister's direct employer, there were no PPI supervisory personnel controlling or directing Brister's work aboard UTP platforms. There is conflicting evidence, however, concerning who actually controlled and supervised Brister's work activities. Brister testified that he worked under his own direction and didn't really have a boss who controlled or directed his work. R. 186-87, 197. Brister determined what maintenance or repair needed to be done and what parts and tools were required to accomplish the work. Requests for parts and tools would be relayed to UTP production foreman A. J. Loupe who would see that the appropriate tools and parts were obtained. R. 186, 200, 216, 230. In contradiction to Brister's explicit testimony that "[h]e was at all times in control of his own work, made his own work decisions, and determined what, when, and where various tasks would be performed," R. 186, was the testimony of UTP production foreman Loupe. In his affidavit, Loupe said

> At all times while working aboard Union Texas platforms, Brister was subject to the *exclusive* control, direction and supervision of Union Texas' supervisory personnel, including myself and others. Orders and directions to Brister were always given by Union Texas personnel, who *directed the specific jobs that Brister was to perform, and how and when he was to do them.*
>
> In assigning work aboard the platforms, Union Texas supervisory personnel made no distinction between Brister, as an employee of PPI and mechanics who were employed directly by Union Texas. Decisions on when and how to use employees were made solely on the basis of what personnel would be available to perform tasks which needed to be done at any given time. Union

> Texas supervisors alone decided what jobs needed to be done, ordered Brister directly to perform the jobs that he worked on, and *supervised the details of his work.*

R. 116 (emphasis added).

The work Brister was performing — maintenance and repair of Solar turbine compressors and the training of UTP personnel to repair or maintain such compressors in the future — was specialized work which Brister was uniquely qualified to perform. The work he performed was essentially that of a hands-on consultant, much like an ordinary office might contract to have an air-conditioning repairman maintain air-conditioning units as well as instruct office personnel in the use and operation of the air-conditioning system.

It is undisputed that Brister was directly employed by PPI and that there was no legal or explicit employment relationship between UTP and Brister. At any time, and particularly at the completion of the UTP job to which Brister was assigned, PPI would have and could have given Brister additional temporary assignments as a turbine compressor expert. R. 189. Such assignments, however, would have been subject to approval by Brister who was actively seeking permanent employment overseas in Saudi Arabia. R. 187. In addition, Brister had been advised by PPI that he could at any time request reassignment from one job to another. R. 187. At all times, therefore, Brister perceived and intended that his direct employment with PPI and his assignments to UTP and/or other oil companies would be of temporary duration. He at no time believed or intended that his assignment with UTP would be other than temporary and was advised that the assignment would last between six and twelve months. R. 187.

In addition to the fact that Brister's assignment to UTP was expressly of limited duration pursuant to the agreement between PPI and UTP, Brister's assignment to UTP differed from that of other PPI personnel in that the specific task to which he was assigned was also of temporary duration. The Solar compressor on which Brister was assigned to work was a newly installed unit and Brister's services were required for the start-up of that new unit. R. 189. While the tasks of other PPI personnel assigned to work on UTP production platforms were essentially ongoing, Brister's primary task (start-up of the Solar compressor) was inherently temporary.

On or about May 2, 1990, while working aboard a UTP production platform, Brister slipped and fell while attempting to reach a compressor in need of repair. There was no adequate access to the compressor and Brister fell while climbing over pipes trying to reach the compressor. Brister suffered a severe injury to his back and has been unable to obtain gainful employment since his accident. He is completely disabled and all medical intervention has been unsuccessful. Brister filed suit on June 11, 1990 alleging jurisdiction based on general maritime law, the law of the State of Louisiana, and for an injury on the Outer Continental Shelf. Brister also alleged diversity jurisdiction.

A motion for summary judgment was brought by UTP which argued that Brister's exclusive remedy was provided by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sections 901-50, as made applicable to Brister through the Outer Continental Shelf Lands Act, 43 U.S.C. Sections 1331-56. In his opposition to the motion for summary judgment, Brister argued that borrowed employee status was a question of fact and that there were numerous genuine issues of material fact regarding borrowed employee status, specifically whether UTP controlled

Brister. He also argued that the borrowed employee doctrine as articulated and applied in the Fifth Circuit was inherently self-contradictory and proposed a more rational and consistent means of determining borrowed employee status. The trial court expressed appreciation for Brister's explication of what it considered a "new approach" to applying the borrowed employee factors, but nevertheless found there were no genuine issues of material fact and that as a matter of law, Brister was a borrowed employee of UTP.

Brister appealed the trial court's grant of summary judgment and made substantially the same arguments before the Court of Appeals. In a four-page opinion which was not designated for publication, the Fifth Circuit upheld the trial court's grant of summary judgment saying

> Appellants do not point out issues of material fact with respect to any of the factors. Rather, they argue that we should modify our interpretation and application of *Ruiz* [*v. Shell Oil Company*, 413 F.2d 310 (5th Cir. 1969)], or, alternatively, abandon *Ruiz* altogether. The facts of this case do not require such a departure from precedent.

Appendix B at A-15.

It is notable that the Fifth Circuit did not designate the opinion for publication. Under Fifth Circuit Local Rule 47.5,

> [t]he publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession.

Appendix B at A-13. By declining to publish the opinion, the Fifth Circuit has deemed Brister's arguments hopelessly without merit.

ARGUMENT

The fact that the Fifth Circuit Court of Appeals panel found Brister's arguments so essentially meritless is perhaps the strongest reason for the Supreme Court to issue a writ of certiorari in this case. In essence, the Fifth Circuit has said there was absolutely nothing even questionably improper about the trial court's grant of summary judgment, including the determination of an absence of genuine questions of material fact and the application of the borrowed employee doctrine to allegedly undisputed material facts. .

It is submitted that the development of the borrowed employee doctrine in the Fifth Circuit has lead to such a departure from the accepted and usual course of judicial proceedings at the trial level that the Supreme Court should exercise its power of supervision. Further, by affirming the trial court's grant of summary judgment and finding that the trial court's decision was based on such well-settled principles of law that the case has no precedential value, the Fifth Circuit has implicitly if not explicitly sanctioned the departure of the trial court from the accepted and usual course of judicial proceedings.

Finally, this court should grant Brister's petition because the decision of the Fifth Circuit in this case and in prior cases is in conflict with settled law in the State of Louisiana. Although the Borrowed Employee Doctrine is used by courts in the State of Louisiana and in the Fifth Circuit in essentially the same manner, Louisiana courts consider the issue of whether a worker is a borrowed

employee to be a question of fact while courts in the Fifth Circuit consider the same issue to be a matter of law. As a result, two cases involving essentially identical factual situations would be resolved differently in federal court than in state court. More particularly, as happened in this case, the plaintiff in federal court is denied his right to a trial by jury and a determination of his employment status by that jury; in state court a plaintiff would have the opportunity to fully present his case to the jury and have that jury's finding affirmed unless clearly erroneous.

While the specific relief Brister seeks is an opportunity to present his case at trial, he is essentially seeking a judicially honest determination of his employment status. Brister seeks judicial honesty not in the sense of questioning the integrity of the trial judge or the judges on the Fifth Circuit panel, but in the sense of compelling a meaningful explanation or reversal of the trend in the Fifth Circuit to hold that borrowed employee status is a matter of law based on certain factors, but that as a matter of law the borrowed employee factors are essentially irrelevant and immaterial.

The Fifth Circuit's Holding That Borrowed Employee Status Is A Matter Of Law Conflicts With Louisiana Law Which Holds That Borrowed Employee Status Is A Question Of Fact

The threshold question is whether the trial court and the Fifth Circuit applied the appropriate legal standard in granting summary judgment. Citing *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253 (1978), and *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244 (5th Cir. 1988), the trial court and the Fifth Circuit, respectively, summarily concluded that whether a worker is a borrowed employee is a question

of law. This is in direct conflict with well-settled law in the State of Louisiana that whether a worker is a borrowed employee is a question of fact. See, e.g., *Brumbaugh v. Marathon Oil Co.*, 507 So.2d 872, 875-76 (La. App. 5 Cir. 1987) (borrowed employee status is fact question for jury under Louisiana jurisprudence; citing *Ruiz* and *Gaudet* with respect to borrowed employee factors); *Leblanc v. Roy Young, Inc.*, 308 So.2d 443, 448 (La. App. 3 Cir. 1975) (borrowed servant is issue of fact), *writ denied*, 313 So.2d 240 (1975) ("Under the facts found, there is no error of law."); *Johnson v. Alexander*, 406 So.2d 1378, 1383 (La. App. 3 Cir. 1981) (borrowed employee status is issue of fact; citing *Ruiz* with respect to borrowed employee factors), *writ granted*, 412 So.2d 88, *two cases, reversed*, 419 So.2d 451, *on remand*, 424 So.2d 1269.

The Fifth Circuit standard that borrowed employee status is a question of law rather than fact evolved over time as the result of a misapplication of the directed verdict standard. In *Kiff v. Travelers Insurance Co.*, 402 F.2d 129, 131 (5th Cir. 1968), the Fifth Circuit noted that the determinative factual ingredients concerning the worker's employment status were not disputed — the only question was whether those facts required imposition of liability. The underlying case cited by the *Kiff* court to support its conclusion that borrowed employee status was a question of law was *American Hardware Mutual Insurance Co. v. Vick*, 268 F.2d 183 (5th Cir. 1959). *American Hardware*, however, simply stated a general rule for directed verdicts that "where evidence is credible, reasonable, uncontradicted and unimpeachable, no question for the jury but only one of law is presented." 268 F.2d at 184 (citation omitted). Although the Fifth Circuit in *Kiff* held it was error for the borrowed employee question to have been submitted to the jury and that the jury had erroneously decided the question, the parties did have the opportunity to

present their evidence at trial and the record was therefore complete.

The Fifth Circuit has now radically departed from this underlying premise. That it might be proper in some cases to direct a verdict on borrowed employee status after trial is completed does not mean borrowed employee status is a question of law in all cases.

In *Ruiz* the Fifth Circuit cited *Kiff* for the proposition that borrowed employee status is a matter of law. "In the absence of substantial evidence to the contrary" and where the facts were "overwhelmingly" contrary to a finding of borrowed employee status, the *Ruiz* court said that whether the worker was a borrowed employee was a matter of law. 413 F.2d at 314.

In the context of a Longshore and Harbor Workers' Compensation Act case, the Fifth Circuit in *Gaudet* once again found that borrowed employee status was a question of law and set out its rationale:

> A dispute over whether one is a borrowed servant (or in a broader context, whether the LHWCA should apply) could still exist although all the facts were stipulated, for it concerns not only the facts themselves but the implications to be drawn from the facts.

562 F.2d at 358. In *Gaudet,* the presumption is that there are no facts in dispute and all that is required is that a conclusion be drawn from the facts. Again, this is essentially a directed verdict standard. However, the Fifth Circuit in *Gaudet* now requires only that "sufficient" determinative factual ingredients be undisputed.

While the distinction between determination of borrowed employee status as a question of fact or a matter of law may largely be a distinction without a difference *after the evidence is presented at trial*, the difference on a motion for summary judgment is substantial as is apparent in this case. In the cited cases, determination of borrowed employee status was made after trial. Recent cases, however, including this case, permit borrowed employee status to be decided on summary judgment. See, e.g., *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615, 617 (5th Cir. 1986).

Thus, in the Fifth Circuit, it is no longer required that the evidence is "credible, reasonable, uncontradicted and unimpeachable" (*American Hardware*); that the "determinative factual ingredients" are undisputed (*Kiff*); or that the facts "overwhelmingly" lead to a particular result (*Ruiz*). All that is required is that "sufficient" determinative factual ingredients are undisputed on a motion for summary judgment.

The Fifth Circuit standard on summary judgment effectively places the burden on the plaintiff to prove non-borrowed employee status. Complicating matters is the fact that it is wholly unclear just what the determinative factors *are* regarding borrowed employee status and how many determinative factors are "sufficient" to establish borrowed employee status. By requiring only the presence of "sufficient" determinative factors and precluding full presentation of evidence on those factors, the Fifth Circuit has completely perverted the summary judgment procedure with respect to borrowed employee status. Summary judgment may not be granted simply because the evidence appears to preponderate in favor of borrowed employee status, summary judgment is appropriate *only* if there is no genuine issue of material fact as to *any* factor.

The determination of borrowed employee status as a question of fact is well established in Louisiana law. Because the Fifth Circuit considers borrowed employee status a question of law while Louisiana courts consider borrowed employee status a question of fact, this court should grant Brister's petition for a writ of certiorari, reverse the Fifth Circuit, and hold that borrowed employee status is a question of fact to be determined by a jury.

The Trial Court And The Fifth Circuit Erred In Finding There Were No Genuine Issues Of Material Fact And Erred In Evaluating And Interpreting The Borrowed Employee Factors

Ostensibly, there are nine factors to be considered in determining borrowed employee status. Commonly called the *Ruiz* factors, they are usually set out as follows:

1. Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

2. Whose work is being performed?

3. Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?

4. Did the employee acquiesce in the new work situation?

5. Did the original employer terminate his relationship with the employee?

6. Who furnished tools and place of performance?

7. Was the new employment over a considerable length of time?

8. Who had the right to discharge the employee?

9. Who had the obligation to pay the employee?

See, e.g., *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615, 616-17 (5th Cir. 1986) (citing *Ruiz*).

The key factor is who controls the worker. Here, Brister testified in an affidavit and at his deposition that he had knowledge and expertise regarding Solar compressors which substantially exceeded that of any other person working offshore and that he controlled his daily activities and work decisions. UTP foreman A. J. Loupe, however, testified that *he* controlled Brister's activities, including the details of his work. This obviously and explicitly conflicting testimony regarding the control of Brister clearly presents a genuine issue of material fact as to who controlled Brister's work. Yet the trial judge and the Fifth Circuit found no genuine issue of material fact.

In this case and in other recent cases, the borrowed employee doctrine has been applied in the Fifth Circuit in a result-oriented manner. A determination is made that a particular worker is a borrowed employee and the nine *Ruiz* factors are then found to conform to that finding. The standard which seems to have actually been applied is suggested by the trial court in its memorandum ruling. There, the trial court said

> Recent decisions by the Fifth Circuit, as well as the District Courts have held in cases substantially similar to the instant one, *where an employee is furnished to an oil company by a direct*

> *employer who simply provides contract labor for ongoing use, control and supervision by the company,* the oil company is a borrowing employer, immune from tort suit.

Appendix A at A-4. (emphasis added). Brister acknowledges that he was directly employed by PPI, that PPI is in the business of providing personnel to oil companies, that he was assigned to UTP by PPI, and that PPI did not supervise his work on UTP platforms. Consistent with the quoted language, the essential holding of the trial court was that a direct employee (Brister) of a personnel company (PPI) assigned to work for an oil company (UTP) pursuant to an agreement between the oil company (UTP) and the personnel company (PPI) is the borrowed employee of the oil company (UTP). That essential holding, however, is not the law. If the Fifth Circuit wishes it to be the law, it is free to abandon the *Ruiz* factors and make such a determination. Instead, it has permitted misapplication of the nine *Ruiz* factors to such an extent that they are literally meaningless.[1]

As this case demonstrates, factor one is essentially irrelevant because the question the court answered was not who controls the worker's work, but who does *not* control the worker's work. The only genuine issue of material fact which is uncontested with respect to the control issue is that PPI did not control Brister. It does not follow from that fact, however, that UTP did control Brister beyond mere suggestion of details or cooperation.

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[1] At the trial and appellate levels, Brister suggested a workable method of applying the *Ruiz* factors in a meaningful, consistent manner which would yield predictable results not in conflict with existing precedent. The issue here is not whether *Ruiz* should be abandoned or modified but whether the *Ruiz* factors were properly applied and weighed in this case.

The second factor has been distinguished to oblivion. It is now irrelevant that Brister was performing work which no UTP or PPI employee was qualified to perform and that very few people in the world were qualified to perform. As long as the work had a benefit to UTP, the trial court found it was necessarily the work of UTP. This attenuated interpretation of "work" was previously approved by the Fifth Circuit in *Melancon*. There, welding was found to be the "work" of an oil company because it "was an essential, although only incidental, aspect of Amoco's business" of petroleum and hydrocarbon production. 834 F.2d at 1245. It is difficult to imagine, however, a situation in which there could be a question of borrowed employee status where the purported borrowing employer did not somehow benefit, "although only incidental[ly]" from the work performed.

The third and fourth factors, agreement between original and borrowing employers and employee acquiescence are apparently satisfied by the mere existence of the work situation. While there was certainly an agreement between PPI and UTP concerning the provision of personnel, including Brister, the mere existence of that agreement does not define a meeting of the minds regarding borrowed employee status. Similarly, the mere presence of Brister on UTP offshore platforms does not constitute acquiescence in the new work situation (i.e., being considered a borrowed employee).

Factor five is also essentially meaningless. As the trial court noted, requiring the lending employer to sever his relationship with the employee would virtually eliminate the borrowed employee doctrine. Appendix A at A-9. The relationship of the original employer with the employee then devolves into a question of whether the original employer exercised control over the employee. As noted above, the lack of control by the original employer is not

equivalent to the presence of control by the purported borrowing employer. The issue here is whether Brister or UTP controlled Brister's work, not whether it was PPI or UTP. One must also define the relationship being severed. Here, Brister used PPI essentially as an agent to obtain contract work for him on a temporary basis and UTP used PPI to locate a Solar compressor specialist for the start-up a newly installed unit. These relationships remained intact.

Factor six looks at who provided the tools and the place of performance. The Fifth Circuit held in *Melancon* that a worker could be a borrowed employee even if the lending employer provided the tools. 834 F.2d at 1246. If it doesn't matter who provided the tools, this supposed factor is not really a factor at all. With respect to the place of performance, this factor is relevant only if it is possible that there be more than one place of performance. For example, if repairs could be performed at an offshore job site *or* at an onshore shop, the place of performance might be relevant. If the nature of the job, e.g., repair of a permanently installed multi-ton compressor, dictates the place of performance, then the place of performance says nothing about borrowed employee status.

Factor seven apparently requires that a new work situation be for a considerable length of time. The Fifth Circuit has nevertheless held that the absence of a considerable length of time could not preclude a worker from being a borrowed employee. *Capps,* 784 F.2d at 618 (one day not considerable, but did not preclude borrowed employee finding).

The final two factors, the right to discharge and the obligation to pay the worker have also been distinguished into irrelevance. It is undisputed that UTP was not Brister's employer and had absolutely no right to formally

terminate Brister's employment with PPI. Similarly, it is undisputed that PPI had the sole obligation to pay Brister and that UTP had no enforceable obligation to pay Brister. Faced with the presence of two factors which clearly weigh against a finding of borrowed employee status, the Fifth Circuit has redefined those terms. In *Melancon*, the Fifth Circuit said that the right to terminate an employee's services on a particular job is sufficient[2] and that a third party's obligation to pay a second party is the same as the third party being obligated to pay the first party directly. 834 F.2d at 1246.

When the nine factors are reviewed in the context of this case, at least three of the factors weigh against a finding that Brister is a borrowed employee. There was absolutely no change in the employment relationship between Brister and PPI, UTP had no power to discharge Brister, and UTP had no obligation to pay Brister. These undisputed facts, however, are irrelevant according to the Fifth Circuit. There are clear questions of fact on four other factors: 1) it is disputed whether Brister controlled his own work or whether UTP controlled his work; 2) it is disputed whether the specialized work on Solar turbine compressors was Brister's work or UTP's work; 3) it is disputed whether PPI and UTP agreed that Brister would be a borrowed employee of UTP; and 4) it is disputed whether Brister acquiesced in becoming a borrowed employee of UTP.

The question the trial court and the Fifth Circuit essentially ignored is whether Brister was more like a direct UTP employee or more like an independent contractor. The question apparently posed and answered was

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[2] It should be noted that an oil company such as UTP has absolute power to remove *anyone* from its job site whether that person is a direct employee, a borrowed employee, an independent contractor, or the President of the United States.

whether Brister was more like a direct PPI employee or more like a direct UTP employee. That is the wrong question. The trial court and the Fifth Circuit have taken the *form* of an employment relationship (use of a nominal employer like PPI) and allowed that form to define the substance. The *Ruiz* factors, however, are intended to assist the trier of fact in defining the true substance of an employment relationship whatever its form. As suggested by the trial court, the determinative factor was not a *Ruiz* factor, it was the admittedly undisputed fact that Brister was nominally employed by PPI. See Appendix A at A-4, A-7. Again, however, that fact does not define Brister's relationship with UTP.

Given the Fifth Circuit's interpretation of the *Ruiz* factors, it is difficult to imagine *any* factual situation which could create a genuine issue of material fact. While Brister believes he has demonstrated genuine issues of material fact, the trial court disagreed. Neither the trial court nor the Fifth Circuit, however, has indicated why the questions of fact raised by Brister are not material. Virtually by definition a "factor" is material.

It is notable that the trial court in *Melancon* had denied a motion for summary judgment where all nine factors had indicated borrowed employee status, but one factor did not clearly weigh in favor of borrowed employee status. 834 F.2d at 1244. Here, however, the individual factors were weighed to *support* borrowed employee status and inferences that might favor non-borrowed employee status were distinguished away. On summary judgment, all inferences are to be drawn in the light most favorable to the non-moving party.

The Ruiz Factors Can Be Rationally And Reasonably Applied Without Substantial Modification Of Existing Precedent

Contrary to the Fifth Circuit's statement in its opinion affirming the trial court's decision, Brister does not seek a radical departure from current precedent nor a substantial modification of *Ruiz* nor abandonment of *Ruiz*. Rather, Brister seeks judicial honesty in the application of the *Ruiz* factors.[3] Essentially, Brister seeks to have the *Ruiz* factors applied before a determination of borrowed employee status is made, rather than simply "applying" the *Ruiz* factors to support a finding of borrowed employee status.

The underlying problem which has led to the confusion in the Fifth Circuit is that mechanical application of the *Ruiz* factors simply doesn't work. The *Ruiz* factors were never intended to be determinative, but rather were intended to provide guidance. Guidance can be provided, however, only if one examines the factor to determine what it is about that factor that is relevant to the borrowed employee question. Is it the presence of the factor or the absence of the factor that is relevant? Does the presence or absence of a factor indicate borrowed employee status or non-borrowed employee status? Or is the presence or absence of a factor essentially neutral?

What Brister has proposed is not a radical departure from precedent — it is *based* on precedent. He is

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[3] Brister's proposed approach is presented here largely for illustrative purposes since this case may be decided based on the existence of genuine issues of material fact and on the error in holding that borrowed employee status is a question of law. The fact that such errors were made, however, indicates the necessity of addressing the underlying legal standard. If the trial and appellate courts believed control was not a disputed question of fact, there are serious problems with the Fifth Circuit's legal definition of the fact of control.

suggesting that the Fifth Circuit use the same approach for all of the factors that it used with respect to the length of time factor in the *Capps* case. There, the worker was injured on his first day on the job. Since one day is not a "considerable" length of time, mechanical application of that factor would have supported a finding that the worker was not a borrowed employee. The Fifth Circuit properly went beyond mechanical application and asked what it was about the length of time factor that was relevant to the borrowed employee question. Although it found that employment over a considerable length of time would tend to indicate borrowed employee status, it held that the absence of employment over a considerable length of time did not necessarily support the finding that the employee was not a borrowed employee. Rather, under the circumstances of that case, the factor had a *neutral* assessment — it supported neither a finding of borrowed employee status nor a finding or non-borrowed employee status. Using basic logic, the Fifth Circuit said

> In the case where the length of employment is considerable, this factor supports a finding that the employee is a "borrowed employee"; however, the converse is not true. When the employee's injury occurs on the first day, it does not follow that the employee is not a borrowed employee; therefore, the factor provides a neutral assessment in the instant case.

784 F.2d at 618.

While the Fifth Circuit is apparently willing to find that one of the *Ruiz* factors can result in a neutral assessment when that factor would otherwise weigh against a finding of borrowed employee status, this case demonstrates that it is unwilling to give a neutral assessment to a factor which would otherwise weigh in favor of

a finding of borrowed employee status. For example, in this case Brister's place of performance was on production platforms where the compressors were located. Since it would be virtually impossible for anyone, *regardless of their employment status*, to work on multi-ton permanently installed compressors anywhere but where the compressors are located, this factor should have a neutral assessment.

The trial court and the Fifth Circuit, however, found that the factor weighed in favor of borrowed employee status. This is a result-oriented double standard. If the length of time factor is significant only when the length of time is considerable, the place of performance is significant only when it is possible to perform the work in different places. To permit this factor to weigh in favor of borrowed employee status on the facts of this case is equivalent to saying that "Joe the Electrician" who is hired to fix an electrical short at the Supreme Court is a borrowed employee of the Supreme Court simply because the short and the circuit breakers, etc. are located in that building. While Joe may or may not actually be a borrowed employee of the Supreme Court, the location of the wires he is fixing says nothing about his borrowed employee status.

The same basic logic applies to the remaining factors. A genuine power to terminate may indicate borrowed employee status, while the mere power to order a worker off a job site says nothing. A formal contractual obligation to pay an employee may indicate that the worker is a borrowed employee. But the mere fact that UTP was obligated to pay PPI and PPI was obligated to pay Brister does not mean that UTP was obligated to pay Brister.

The most critical factor is who controlled the employee's work. Here, the trial court apparently focused on the fact that PPI did not control Brister. If PPI did

control Brister, he would not be a borrowed employee. But the absence of control by PPI only changes the question to whether UTP or Brister exercised control over Brister. If Brister controlled his own work, he is not a borrowed employee. If UTP exercised control over Brister, he would probably be a borrowed employee. If UTP did not exercise control over Brister, it would be irrelevant whether Brister or PPI exercised such control since Brister would clearly not be a borrowed employee of UTP.

Using this basic approach, it is apparent that the control question remains unresolved and summary judgment was therefore improperly granted. In order to properly apply the control factor, it is necessary to know who controlled Brister's work beyond the mere suggestion of details or cooperation. Unless this court can conclude based on the evidence in the record that it is undisputed that UTP controlled Brister's work beyond the mere suggestion of details or cooperation, Brister's petition should be granted and this case remanded for trial.

CONCLUSION

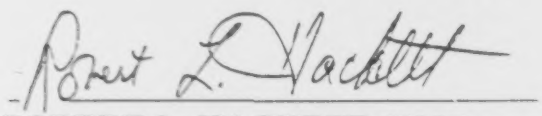
The issue before the Court is not whether Brister is or is not a borrowed employee. The question is whether Brister will have an opportunity to present evidence at trial demonstrating that he was essentially an independent contractor with highly specialized skills who was working a temporary assignment. Brister has been denied that opportunity because the Fifth Circuit 1) views borrowed employee status as a question of law (in conflict with Louisiana law); 2) affirmed the trial court's finding that there were no genuine issues of material fact (notwithstanding contradictory affidavits by Brister and UTP foreman Loupe); and 3) permits application of the *Ruiz* borrowed employee factors in a contradictory and inconsistent

manner.

Brister requests that this Court exercise its power of supervision to correct the trial court's substantial departure from the accepted and usual course of judicial proceedings and the Fifth Circuit Court of Appeals' sanctioning of the trial court's departure. This Court should also exercise its supervisory power to resolve the conflict between the Fifth Circuit holdings and those of the state courts of Louisiana concerning whether determination of borrowed employee status is a question of law or a question of fact.

The current application of the borrowed employee doctrine in the Fifth Circuit has the potential to lead to inconsistent results under substantially similar factual situations. More particularly, it results in a denial of a plaintiff's access to federal court since, as here, borrowed employee status may be determined on a motion for summary judgment even where there are genuine issues of material facts which remain unresolved.

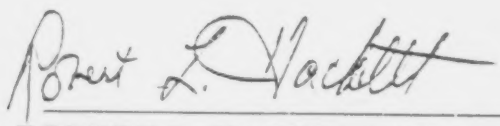
Respectfully submitted,



ROBERT L. HACKETT #6397
Oestreicher & Hackett
Counsel for Plaintiff/Petitioner
307 Exchange Alley
New Orleans, Louisiana 70130
Telephone: (504) 529-7666

CERTIFICATE OF SERVICE

Undersigned counsel for Petitioner certifies that service of this Petition for Writ of Certiorari has been made upon Counsel for Respondent this date by depositing three copies hereof in the United States mail, first class postage prepaid.



ROBERT L. HACKETT #6397

APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

FILED
AUG 26 1991

ROGER GLEN BRISTER, ET AL — CV 90-1157

VERSUS — JUDGE HUNTER

UNION TEXAS PETROLEUM CORPORATION — MAGISTRATE JUDGE TRIMBLE

MEMORANDUM RULING

This case confronts us once again with the issue presented by Union Texas Petroleum Corporation (UTP) in its Motion for Summary Judgment. Was plaintiff Roger Glen Brister (Brister), employee of Petroleum Personnel, Inc. (PPI), actually a "borrowed employee" of UTP? If Brister is found to be a borrowed employee, then his sole remedy against UTP is provided under the Longshore and Harbor Worker's Compensation Act (LHWCA), 33 U.S.C. 901 et seq., made applicable to plaintiff's claim under the Outer Continental Shelf Lands Act, 43 U.S.C. 1331 et seq.

Plaintiffs, Brister and his wife, seek to recover damages for personal injuries suffered in an accident which occurred on one of UTP's oil rigs in the Gulf of Mexico on May 2, 1990. At the time of the accident, Brister was formally employed by PPI and was designated as a "mechanic

gr. III." He was hired to fill a mechanic slot on Job 757 (UTP's rigs) at the pay rate of $13.10 per hour according to PPI's Employee Status Report of October 20, 1989. Brister contends that he was hired as a "consultant" expert to oversee the operations of defendant's solar compressor.

Thereafter, for the entire six months prior to his alleged accident on May 2, 1990, Brister continued working for UTP as a PPI payroll employee in the Vermilion Area. Brister testified that, during the six month period, he worked exclusively on UTP wells located on platforms. *There were no PPI supervisors in the field.* As a mechanic, Brister maintained all of UTP's electrical and compressor equipment, which was located on UTP platforms, alongside both contract hands and directly employed UTP personnel, on a daily basis. *None* of the equipment which he maintained was owned by PPI.

Brister reported for his hitch every other week to ERA Helicopters in New Iberia. That company had been contracted by UTP to fly UTP direct employees and PPI contract personnel to and from the worksite. Upon arrival at the UTP platform, Brister reported to the UTP foreman, A. J. Loupe. He ate and slept, along with UTP direct employees and other PPI contract hands, aboard Vermilion 237, the main platform in the area.

In the Vermilion Area, he normally worked in the field with both PPI contract hands and directly employed UTP personnel. Indeed, his relief on the opposite hitch was Charles Dunston, a directly employed UTP mechanic. The personnel would use either a boat or helicopter, both of which were contracted by UTP, to visit UTP satellite platforms. Plaintiff was paid an hourly wage by PPI. They furnished no tools. His tools were purchased and kept offshore by UTP. A large toolbox was moved to the UTP platforms

via a crane owned and operated by UTP.

The affidavit of A. J. Loupe, the UTP field production foreman, conclusively demonstrates that UTP alone, not PPI, controlled the details of Brister's work. Loupe has complete responsibility for the UTP platforms in the Vermilion Area. Orders to Brister were always given by UTP personnel, who directed the specific jobs that he was to perform, as well as how and when to do them. Loupe also stated that UTP supervisors alone decided what jobs needed to be done, ordered Brister directly to perform them, and supervised the details of his work, all without any supervision or instructions from PPI. Loupe's testimony additionally confirms that Brister ate, slept and worked with UTP employees. We reiterate foremen had total supervisory control on the UTP job site and PPI provided no supervisory personnel there.

The issue of whether a claimant is a borrowed employee is a matter of law, and, therefore, a proper issue for determination by summary judgment. *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913, 98 S.Ct. 2253 (1978). However, a court may grant summary judgment only if sufficient factual ingredients are undisputed. *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986).

The Fifth Circuit has set forth nine factors which the courts are to evaluate in determining whether an employee has become a borrowed employee, as follows:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?

(2) Whose work is being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original employer and the borrowing employer?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished the tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Capps, supra; citing, Ruiz v. Shell Oil Co., 413 F.2d 310 (5th Cir. 1969). Plaintiffs assert that there are "serious problems" with the application and interpretation of these factors. They urge that this Court take a new approach when applying them, and have stitched together a circumstantial case suggesting that there is a disputed factual issue on several of the tests. We are not so persuaded, but do express appreciation to counsel for an excellent presentation of his side of this case.

Recent decisions by the Fifth Circuit, as well as the District Courts, have held in cases substantially similar to the instant one, where an employee is furnished to an oil company by a direct employer who simply provides contract labor for ongoing use, control and supervision by the company, the oil company is a borrowing employer, immune from tort suit. For example, in *Melcancon v. Amoco*

Production Co., 834 F.2d 1238 (5th Cir. 1988), the plaintiff-welder was technically employed by a service company, but had worked for Amoco as a welder on Amoco production platforms for several years prior to the accident upon which he brought suit. Like Brister, Melancon lived, ate, and worked with Amoco's direct employees. As with Brister, Melancon was given directions on when and where to work by company supervisory personnel. Company personnel even let Melancon, an expert welder, choose the manner in which to do his welding work. Notwithstanding Melancon's control of the details of his work, applying the nine *Ruiz* factors, the Fifth Circuit found that Amoco's relationship to, and management of, Melancon conferred borrowed employee status on him, and that his tort action against Amoco was barred. *Id.* at 1244-46.

Here, Brister was not a specialist. Instead, like the other company and contract mechanics, he performed what-ever labor UTP needed to maintain its electrical and compressor equipment located on its platforms in the field. The facts here indicate an even stronger borrowed employee case than *Melancon.* Employees brokered through such firms are classic "borrowed employees" since the companies which directly employ them do not perform their own work or services. Rather, they are in the business of "lending" employees for whatever uses others may wish to make of them.

Several other courts have recognized this fact and held workers procured through such companies to be borrowed employees. For example, in *Capps, supra,* the Fifth Circuit focused on an employee furnished by a company specializing in the supply of laborers. 784 F.2d at 616. Capps, the plaintiff, was employed by a company (David) specializing in supplying general labor to companies in need of temporary help. Through Davis, Baroid hired

Capps to perform cleaning work at one of its plants. As in the other cases, the temporary employee, Capps, was subject to complete control by the borrowing employer, Baroid, while being given no supervision by the nominal employer, Davis. Based on this relationship, the Fifth Circuit affirmed summary judgment dismissing the plaintiff's tort claims against Baroid. *Id.* at 618.

More recently, in *Hardin v. Conoco, Inc.*, 712 F. Supp. 1240 (W.D. La. 1989), *aff'd*, 901 F.2d 1112 (5th Cir. 1990), the plaintiff was an oilfield laborer nominally employed by T.J.O. was "in the business of supplying labor services to different oil companies," just like PPI. As with Brister, Hardin worked exclusively for one oil company during his entire nominal employment period with the oilfield labor service company. In addition, Conoco, like UTP in the instant case, provided Hardin with transportation to and from work, as well as all of his equipment. Just like Brister, Hardin's job was to follow the orders of the oil company's field boss. Moreover, there was no T.J.O. personnel on board the Conoco platform and Hardin's daily time sheets would be reviewed by Conoco before Hardin received his payroll check from T.J.O. *Id.* at 1242. Considering those facts, which are indistinguishable from the facts of the case *sub judice*, this Court granted summary judgment in Conoco's favor on its borrowed servant argument, dismissing Hardin's case against Conoco. *Id.* at 1246-47.

In another recent case, *Roche v. Mark Producing, Inc.*, 712 F.Supp. 1247 (W.D.La.) (Appendix), *aff'd*, 875 F.2d 859 (5th Cir. 1989), Judge Shaw likewise granted summary judgment in favor of a company using a temporary employee. In *Roche*, the plaintiff was a direct employee of PMC, which, like PPI in this case, was in the business of providing crew members to oil producing companies. PMC

contracted with Mark Producing to provide temporary offshore personnel and furnished the plaintiff, just as PPI furnished Brister in the case at bar. Like Brister, Roche continuously worked at one platform (or group of platforms) for several months prior to his accident. Mark provided the workplace, living quarters, and tools for Roche, just as UTP did for Brister. In addition, Mark had the right to request the replacement of Roche, just as UTP had such a right with regard to Brister. Based on those almost identical facts, the Court concluded that Roche was Mark's borrowed employee. *Id.* at 1249.

As the foregoing discussion reflects, decisions from the Fifth Circuit, including the most recent pronouncements under the borrowed servant doctrine, uniformly hold that employees who are hired directly by companies for the sole purpose of providing contract labor to an oil company become borrowed employees of the oil company when that company assumes supervision and control over the employees' work. As the deposition testimony and affidavits unequivocally establish, *PPI had nothing to do with the actual work being performed by Brister.* Brister reported to work at UTP. He worked exclusively and regularly for UTP. He worked alongside UTP direct employees, received orders, directions and supervision exclusively from UTP supervisory personnel. He used work tools and equipment provided exclusively by UTP. He lived, slept and ate with UTP employees. It would be difficult to imagine a clearer illustration of the borrowed servant relationship than exists here.

We discuss each of the *Ruiz* factors in turn:

(1) Who has control over the employee and the work he was performing, beyond mere suggestion of details and cooperation?

It is this factor that our courts have deemed to be the most important of the nine. *Capps*, 784 F.2d at 617; *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988). Plaintiffs insist that this is a case where the employee more closely resembled an independent contractor (compressor consultant) than a borrowed employee. The record does not support this contention. Contrary to the expert consultant theory, Brister did the servicing and repair work himself (as a mechanic), rather than acting as a consultant to UTP on how problems should be dealt with. Brister admitted that he was subject to being removed from the UTP job. This suggests an employer-employee relationship with PPI, not an independent contractor hired to do a job. Brister admitted in his answers to interrogatories that the was "servicing a gas compressor *under A. J. Loupe instructions.*" He was assigned to UTP as a "mechanic," and was listed on PPI's reports as a "mechanic" instead of as a consultant or expert. The affidavit and deposition of Mr. Loupe indicate that he had supervisory authority over all of the work being done there, including that of Brister.

Brister was a skilled electrician-mechanic and was employed in that capacity. He possessed expertise in this field that none of UTP's personnel could match. The fact that a plaintiff has specialized skills which he utilizes in most of his work, or that none of the borrowing employers' personnel have such expertise, does not bar a finding of "borrowed employee" status. *Melancon*, 834 F.2d at 1245.

(2) Whose work is being performed?

There can be no doubt that Brister was performing UTP's work. Brister assisted in UTP's production of hydrocarbons by maintaining the compressors and electrical systems on the rigs. It is irrelevant that Brister's primary job was as an electrician on the compressors,

which was an essential, although only incidental, aspect of UTP's business. *Melancon*, 834 F.2d at 1245.

(3) Was there an agreement, understanding, or meeting of the minds between the original employer and the borrowing employer?

There can be no doubt as to this factor. PPI provided personnel, including mechanics, to UTP without providing any supervisory personnel.

(4) Did the employee acquiesce in the new work situation?

Brister acquiesced to his new work situation. He knew when he started his work on UTP's offshore platforms what his work conditions would be. He never complained about those work conditions to either UTP or PPI. *Melancon*, 834 F.2d at 1246.

(5) Did the original employer terminate his relationship with the employee?

This factor does not mandate that a lending employer completely sever its relationship with the employee. Such a requirement would eliminate the borrowed employee doctrine. When considering this factor the emphasis should focus on the lending employer's relationship with the employee while the borrowing occurs. *Melancon*, 834 F.2d at 1246. PPI maintained minimal control over Brister while Brister worked on the UTP job. They could remove him from the job. They made out his checks after being provided with time sheets, but maintained no supervisory authority or substantial contact with him.

(6) Who furnished the tools and place for performance?

UPT provided Brister with the tools necessary for carrying out his duties. It is undisputed that all of the work was done on UTP's rigs. Plaintiffs make much of the fact that Brister told UTP what tools he would need, and then UTP spent thousands of dollars to provide them. In *Melancon* the lending employer provided plaintiff's welding machine and related equipment, while the borrowing employer furnished certain consumables, the place of performance, transportation to and from the place of work, food and lodging, and the Fifth Circuit still had no problem in finding this factor weighed in favor of the borrowing employer. *Id.* at 1246. In the instant case, UTP provided all of the things that the borrowing employer in *Melancon* provided, and also provided all of the tools.

(7) Was the new employment over a considerable length of time?

Brister worked on a seven-on/seven-off work shift for about six months. In the appendix to *Hardin v. Conoco, Inc.*, 712 F.Supp. 1240 (W.D. La. 1989), the case of *Roche v. Mark Producing, Inc.*, Civil Action Number 86-0385 (W.D. La.) is reproduced in its entirety. In *Roche* Judge Shaw concluded that a plaintiff who worked the same type of schedule for roughly the same amount of time had been at the new employment for a considerable length of time for purposes of determining if plaintiff was a borrowed employee. *Hardin* (appendix), 712 F.Supp. at 1248. We agree with that holding.

(8) Who had the right to discharge the employee?

UTP had the authority to terminate Brister's services with UTP. A borrowing employer's right to terminate

an employee's services with the borrowing employer suffices to satisfy this requirement, even though the borrowing employer could not terminate the employee's relationship with the lending employer. *Melancon*, 834 F.2d at 1246.

(9) Who had the obligation to pay the employee?

Brister's checks were made out by PPI. UTP paid Brister's wages through PPI based on the number of hours that Brister worked for UTP. The fact that PPI kept a percentage of the amount that UTP paid is not relevant. UTP furnished the funds from which PPI paid Brister. This is the determinative point. *Melancon*, 834 F.2d at 1246.

CONCLUSION

The potential for significant uncertainty in the law as to whether "borrowed employee" decisions are for the court or the jury does exist, but here we have a classic case of a borrowed employee. Plaintiffs' exclusive remedy is under the LHWCA.[1] UTP is immune from tort liability.

Accordingly;

Defendant's Motion for Summary Judgment is GRANTED.

THUS DONE AND SIGNED in Chambers at Lake Charles, Louisiana, this 26th day of August, 1991.

/s/ Edwin F. Hunter, Jr.
EDWIN F. HUNTER, JR.
UNITED STATES DISTRICT JUDGE
SENIOR STATUS

COPY SENT
DATE 8-26-91
BY ln
TO: Cappel
Lowe
Hackett

[1] Plaintiff has received $20,881.20 in medical benefits from Aetna Casualty and has received $17,094 in compensation benefits. These payments appear to be continuing.

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 91-4813
Summary Calendar

ROGER GLEN BRISTER, Individually and as Natural Tutor and Administrator o/b/o Eric Brister Estate, and PATRICIA GONZALES BRISTER,

Plaintiffs-Appellants,

VERSUS

UNION TEXAS PETROLEUM CORP.,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Louisiana
(90-1157)

(April 2, 1992)

Before JONES, DUHE', and WIENER, Circuit Judges.

DUHE', Circuit Judge:[1]

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Appellants seek review of the summary judgment granted in their personal injury suit against Union Petroleum [UTP]. We affirm.

Appellant Roger Brister was injured while working aboard a petroleum production platform owned and operated by UTP. Appellants sued UTP under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-56. Finding that Brister was a borrowed employee of UTP and that his exclusive remedy was provided by the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §§ 901-50, the district court granted UTP summary judgment.

Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In reviewing the summary judgment, we apply the same standard of review as did the district court. *Waltman v. International Paper Co.*, 875 F.2d 468, 474 (5th Cir. 1989); *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989). The pleadings, depositions, admissions, and answers to interrogatories, together with affidavits, must demonstrate that no genuine issue of material fact remains. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). To that end we must "review the facts drawing all inferences most favorable to the party opposing the motion." *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986). If the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *see Boeing Co. v. Shipman*, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

Whether a worker is a borrowed employee is a question of law. *Melancon v. Amoco Production Co.*, 834 F.2d

1238, 1244 (5th Cir. 1988). There are nine factual inquiries underlying borrowed employee status. *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312-13 (5th Cir. 1969). Nonetheless, summary judgment is appropriate when none of the inquiries reveals a disputed issue of fact. *Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 617 (5th Cir.), *cert. denied*, 479 U.S. 838 (1986).

After examining each of *Ruiz's* nine factors, the district court in this case found that the facts supporting borrowed employee status were not in dispute. We agree. Indeed, Appellants do not point out issues of material fact with respect to any of the factors. Rather, they argue that we should modify our interpretation and application of *Ruiz*, or, alternatively, abandon *Ruiz* altogether. The facts of this case do not require such a departure from precedent.

Nor are we persuaded by Appellants' contention that the district court applied the wrong summary judgment standard. We are satisfied that the language used by the district court, "sufficient basic factual ingredients are undisputed," did not compromise the standard set forth in Rule 56(c). Our independent review of the record confirms the absence of a genuine issue as to any material fact concerning Brister's borrowed employee status. The judgment of the district court, therefore, is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

FILED
AUG 30 1991

ROGER GLEN BRISTER, INDIVIDUALLY AND AS NATURAL TUTOR AND ADMINISTRATOR OF THE ESTATE OF HIS MINOR CHILD, ERIC BRISTER, AND PATRICIA GONZALES BRISTER	*	CIVIL ACTION
	*	V90-1157
	*	JUDGE HUNTER
VERSUS		
UNION TEXAS PETROLEUM CORPORATION	*	MAGISTRATE TRIMBLE

* *

FINAL JUDGMENT

Considering the Motion for Summary Judgment filed on Behalf of Union Texas Petroleum Corporation ("UTP") and this Court's Memorandum Ruling dated August 26, 1991, wherein the Court granted UTP's Motion for Summary Judgment against the Plaintiffs' claims herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Memorandum Ruling entered herein on August 26, 1991, granting the Motion for Summary Judgment in favor of UTP against the Plaintiffs, be and it hereby is made a final judgment of this court; and

IT IS ALSO HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiffs' Complaint against UTP be and it hereby is dismissed with prejudice.

Lake Charles, Louisiana, this 30th day of Aug., 1991.

/s/ EFH,Jr.

EDWIN F. HUNTER, JR.
Senior Judge
United States District Court

Judgment Entered 9-3-91
BY Celia Ann Gallagher
COPY TO Hackett
Lowe
Cappel